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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered* **29/06/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION FOR JUDICIAL REVIEW

Between

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Appellant

and

THE DEPARTMENT FOR JUSTICE

Appellant

and

THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Respondent

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

MORGAN LCJ

[1] This is an appeal by the Attorney General and Department of Justice against an Order made by Horner J on 16 December 2015 when he declared that sections 58 and 59 of the Offences against the Person Act 1861 ("the 1861 Act") and section 25 of

the Criminal Justice Act (Northern Ireland) 1945 ("the 1945 Act") were incompatible with Article 8 of the European Convention on Human Rights ("ECHR") insofar as it is an offence:

(i) to procure a miscarriage at any stage during a pregnancy where the foetus has been diagnosed with a fatal foetal abnormality;

(ii) to procure a miscarriage up to the date when the foetus is capable of being born alive where a pregnancy arises as a result of rape or incest.

The respondent contends by way of a respondent's notice that the said sections of the 1861 Act and the 1945 Act are also incompatible with Article 3 and Article 14 read with Article 8 of the ECHR and that appropriate declarations should be made in respect of serious foetal abnormality, rape and incest.

The relevant provisions of the 1861 Act and the 1945 Act are:

> "**Administering drugs or using instruments to procure abortion**
>
> 58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable [to be imprisoned] for life [or to be fined or both].
>
> **Procuring drugs, & c. to cause abortion**
>
> 59. Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being

convicted thereof shall be liable [to be imprisoned for five years] [or to be fined or both].

Punishment for child destruction

25. - (1) Subject as hereafter in this sub-section provided, any person who, with intent to destroy the life of a child then capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to [imprisonment] for life [or a fine or both]:

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

Ms Nathalie Lieven QC appeared with Ms McMahon and Mr Blundell for the Northern Ireland Human Rights Commission ("the Commission"), Mr McGleenan QC and Mr McLaughlin appeared on behalf of the Department of Justice and the Attorney General appeared with Ms Gillen. We also had the benefit of written submissions from Sarah Jane Ewart, the Northern Catholic Bishops, the Society for the Protection of Unborn Children, the Family Planning Association, Abortion Support Network, Alliance for Choice and Amnesty International. We are grateful to all counsel and to those who made written submissions, including those submitted in March 2017 on the meaning of "unlawfully" in the 1861 Act, for the measured and thoughtful manner in which this sensitive issue was approached.

Background

[2] The Commission was established by Section 68 of the Northern Ireland Act 1998 ("the 1998 Act"). It had been identified in Strand Three of the Agreement reached in multi-party negotiations, known as the Belfast/Good Friday Agreement ("the Agreement"), as a new institution with a role in relation to issues of rights, safeguards and equality of opportunity. The Agreement indicated at paragraph 5 that its functions would include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to government as necessary; providing information and promoting awareness of human rights;

considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so. Those functions were broadly incorporated in section 69 of the 1998 Act.

[3] On 8 October 2004 this court gave judgment on an application by the Family Planning Association of Northern Ireland declaring that the Minister for Health, Social Services and Public Safety ("DHSSPS") should issue advice and/or guidance to women and clinicians in Northern Ireland on the availability and provision of termination of pregnancy services in light of uncertainty as to when such services could lawfully be provided. There was a lamentable delay in responding to the declaration. Guidance was produced in 2009 but was successfully judicially reviewed by the Society for the Protection of Unborn Children. It was not until April 2013 that the DHSSPS issued "The Limited Circumstances for Unlawful Termination of Pregnancy in Northern Ireland - A Guidance Document for Health and Social Care Professionals on Law and Clinical Practice."

[4] On 4 November 2013 the then Chair of the Commission wrote to both the Minister of Justice ("the Minister") and the DHSSPS Minister enclosing advices pursuant to the Commission's statutory remit under section 69 (3) of the 1998 Act. The Commission advised that:

(i) the failure to provide a termination of pregnancy procedure in instances of rape may constitute a violation of ECHR Article 8 and that the failure to provide a coherent legal framework and the failure to provide an effective and accessible means of protecting the right to respect for private life were violations of the same Article;

(ii) the failure to provide a facility for the termination of a pregnancy that has arisen in circumstances of rape or sexual abuse (incest) or in cases of serious malformation of the foetus may compound the ill-treatment flowing from the rape or sexual abuse and may constitute a further violation of ECHR Article 3;

(iii) since women in Northern Ireland have to overcome financial obstacles that do not exist for women in the rest of the United Kingdom, to the extent that ECHR Articles 3 and 8 are engaged in this matter, the non-provision of termination may also constitute a violation of ECHR Article 14;

(iv) the law in Northern Ireland should be amended to provide for termination of pregnancy within this jurisdiction on grounds of rape, sexual abuse (incest) and in cases of serious malformation of the foetus.

[5] On 4 August 2014 the Minister wrote to the Commission stating his intention to present a consultation paper to alter the law on abortion to enable women to choose to terminate their pregnancy if there were a diagnosis that the foetus was suffering from a lethal abnormality. The Minister also indicated that the consultation would include a section seeking views on how best to address the issue of legalising abortion for pregnancies as a result of sexual crime. The consultation document was issued on 20 October 2014. On 7 November 2014 the Commission sent a pre-action letter to the Department of Justice ("the Department") indicating its intention to launch proceedings unless the Department brought forward legislation to allow for unlawful termination of pregnancy in circumstances of serious malformation of the foetus, rape or incest. The Department responded on 1 December 2014 indicating that in light of the ongoing consultation process any proceedings were premature and ill founded.

[6] On 11 December 2014 the Commission issued its Order 53 Statement seeking the following relief:

(a) A declaration pursuant to section 6 and section 4 of the Human Rights Act 1998, that sections 58 and 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (NI) 1945 are incompatible with Articles 3, 8 and 14 of the ECHR as they relate to access to termination of pregnancy services for women in cases of serious malformation of the foetus or pregnancy as a result of rape or incest;

(b) A declaration that, notwithstanding the provisions of sections 58 and 59 of the Offences against the Person Act 1861 and section 25 of the Criminal Justice Act (NI) 1945, women in Northern Ireland may lawfully access termination of pregnancy services within Northern Ireland in cases of serious malformation of the foetus or rape or incest;

(c) Further and in the alternative, a declaration that the rights of women in Northern Ireland, with a diagnosis of serious malformation of the foetus or who are pregnant as a result of rape or incest, under Articles 3, 8 and 14 ECHR are breached by sections 58 and 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (NI) 1945.

The grounds for the relief were that women and girls in Northern Ireland who were pregnant and had a diagnosis of serious malformation of the foetus or who became pregnant as a result of rape or incest were prohibited from accessing abortion

services in Northern Ireland to terminate the pregnancy in breach of their Convention rights. The Minister had acted incompatibly with the rights of those women by refusing to amend the current legislative provisions.

Standing

[7] The Attorney General supported by the Department submitted that the Commission did not have legal power to maintain this application. It is common case that the Commission only has the powers conferred upon it by statute (Re Northern Ireland Human Rights Commission (Northern Ireland) [2002] NI 236 at [14]). Section 69(5)(b) of the 1998 Act enables the Commission to bring proceedings involving law or practice relating to the protection of human rights. Section 70 establishes the circumstances in which the Commission can give assistance to a litigant. Section 71 as originally drafted provided:

> "71. - (1) Nothing in section 6(2)(c), 24(1)(a) or 69(5)(b) shall enable a person-
>
> (a) to bring any proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the Convention rights; or
>
> (b) to rely on any of the Convention rights in any such proceedings,
>
> unless he would be a victim for the purposes of Article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights."

[8] This provision was considered by the House of Lords in Re Northern Ireland Human Rights Commission [2002] NI 236. That case concerned the entitlement of the Commission to intervene in Coroners Court proceedings but at paragraph [23] Lord Slynn expressed his view on the operation of Section 69 (5):

> "It has to be accepted that sub-s (5)(a) in itself is limited to giving financial and other assistance to individuals in accordance with s 70. Moreover sub-s (5)(b) refers to 'bring[ing] proceedings' which as the Lord Chief Justice said is not apposite to an inquisitorial inquest before a Coroner. Both sub-ss, however, indicate a role for the

> Commission in connection with court proceedings even though in respect of proceedings in which it is sought to contend that legislation is incompatible with the European Human Rights Convention they can only be brought, it seems, if the Commission can show that it is a victim for the purposes of the Convention."

The only other opinion which touched upon the matter of standing was the dissenting judgement of Lord Hobhouse who said at paragraph [72]:

> "But that is not the present case and the provision of assistance to unrepresented or inadequately represented parties or acting for victims of human rights infringements is already expressly dealt with in s 69(5), s 70 and s 71. (It should be noted, pace what my noble and learned friend Lord Slynn has said in para 23 of his opinion, that in ss 70 and 71 the 'person' referred to is not the Commission but the person whom the Commission is assisting or acting for.)"

Lord Hobhouse's analysis is plainly right in relation to Section 70. It also deals with the difficulties that the Commission would have in demonstrating that it was a victim under Convention jurisprudence. There are potentially two problems the Commission would face if it sought to apply to the Strasbourg court. The first is that an application can only be made to the ECtHR by "any person, non-governmental organization or group of individuals claiming to be a victim…". The Commission was established by statute for the public purpose of promoting respect for human rights and may, therefore, be considered a public or governmental authority. The second relates to the distinction between those directly affected by a particular measure, who can apply, and those simply seeking to challenge domestic laws by way of an *actio popularis*, who cannot. It was on the latter basis that the National Gay Federation was not considered a victim in Norris v Ireland [1989] 13 EHRR 186. We express no final view on whether the Commission could have been a victim for the purposes of Article 34 of the Convention but the terms of the Agreement dealing with the establishment of the Commission contemplated that it would have powers to bring proceedings in respect of rights, safeguards and equality of opportunity. It would be inconsistent with that remit for the Commission to be entitled to bring

proceedings only where it was a victim since the object of the power is to enable the Commission to assist others.

[9] I consider, therefore, that Lord Hobhouse's analysis is to be preferred. On that view, under the legislation as originally drafted the Commission had to demonstrate that it was acting for the benefit of a person who could maintain victim status in Strasbourg. That applied both to proceedings in which it was claimed that a public authority had acted unlawfully and also to proceedings in which it was claimed that an Act of Parliament was incompatible with Convention rights.

[10] Section 71 was amended by the Justice and Security Act (NI) 2007 by deleting the reference to s 69(5)(b) in s 71(1) and adding the following:

> "(2A) Subsection (1) does not apply to the Commission.
>
> (2B) In relation to the Commission's instituting, or intervening in, human rights proceedings—
>
> (a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate,
>
> (b) section 7(3) and (4) of the Human Rights Act 1998 (breach of Convention rights: sufficient interest, &c.) shall not apply,
>
> (c) the Commission may act only if there is or would be one or more victims of the unlawful act, and
>
> (d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies).
>
> (2C) For the purposes of subsection (2B)—
>
> (a) "human rights proceedings" means proceedings which rely (wholly or partly) on—
>
> (i) section 7(1)(b) of the Human Rights Act 1998, or
>
> (ii) section 69(5)(b) of this Act, and

> (b) an expression used in subsection (2B) and in section 7 of the Human Rights Act 1998 has the same meaning in subsection (2B) as in section 7."

As the learned trial judge noted, the explanatory notes to the amending Act indicated in the discussion about the background to the provision that it was intended to extend the powers of the Commission by enabling it to institute proceedings in its own right and when doing so to rely upon the Convention. Section 71(2A) removed any doubt about the Commission having to demonstrate that it was a victim. The explanatory notes also contained a proviso for the exercise of the power that "there is, or would be, a victim (so far as the Convention is concerned of the unlawful act)". That is reflected in section 71(2B)(c) to which we will return. The amended provision, therefore, enabled the Commission to act where it could demonstrate that there was a victim. I will consider the position where there would be a victim when I examine the second objection by the Attorney.

The appellants' submissions

[11] The Attorney, supported by the Department, submitted that the Commission faced two difficulties in these proceedings. The first was a failure to identify an unlawful act. Sections 58 and 59 of the 1861 Act were primary legislation. The unlawful act upon which the Commission relied was the refusal by the Minister to amend those legislative provisions. As he pointed out, however, the Minister has no power to make Acts of the Assembly and it was submitted that decisions to bring or not bring matters before the Assembly were not justiciable since it was the content of Acts passed by the Assembly that had legal significance.

[12] Alternatively, the subject matter was both significant and controversial and lay outside the agreed programme for government referred to in paragraph 20 of Strand One of the Agreement. In addition it cut across the responsibilities of the Minister and the DHSSPS Minister. Accordingly, it was not possible for the Minister to introduce a Bill of the type desired by the Commission to the Assembly without the approval of the Executive Committee. Those were all features of the legislative arrangements under the 1998 Act as amended. Since there was no incompatibility challenge to that legislation the Minister was required to act in accordance with it and his failure to bring forward legislative proposals to the Assembly was not unlawful by virtue of section 6(2) of the Human Rights Act 1998 even if it resulted in a breach of Convention rights.

[13] Secondly, it was submitted that if it was entitled to advance the case the Commission must, to make good each of its claims, identify someone who was or would be a victim of each asserted breach to allow the court to examine the particular facts of that case. An application for anonymity could, of course, be made. It was not open to the Commission to rely on material put forward by interveners or to rely on affidavit evidence from people who knew women who were directly affected. The Attorney General submitted that there was a clear line of jurisprudence from the ECtHR which indicated that an applicant must produce a concrete factual matrix rather than a general attack upon the relevant legislation in the abstract. The Attorney maintained that this proposition was supported by the observations of Lord Mance in R (Nicklinson) v Ministry of Justice [2015] AC 657 at [177]:

> "The claimants' primary case before the Supreme Court amounts in substance to an invitation to shortcut potentially sensitive and difficult issues of fact and expertise, by relying on secondary material. There can my opinion be no question of doing that."

The evidence of victimhood

[14] The grounding affidavit of Mr Allamby recorded the statutory position on the entitlement of the Commission to institute proceedings and indicated that the Commission sought to establish the rights of women who faced reproductive healthcare choices in circumstances of serious malformation of the foetus and rape or incest. He indicated that the definitive numbers of women who may need access to termination of pregnancy services in cases of rape or incest is unknown. He noted the published figures in relation to sexual assaults and the figures included in the Department of Justice Consultation for those residents of Northern Ireland who had abortions performed in England and Wales. He stated that the number of legal abortions performed in Northern Ireland for 2012/13 was 51. He did not make reference to any concrete example about any of the specific conditions with which this litigation is concerned.

[15] Dawn Purvis was the Programme Director of Marie Stopes International in Northern Ireland ("MSNI") and she swore an affidavit in support of the leave application. MSNI offered medical abortions up to 9 weeks and four days gestation and operated strictly within the criminal law in Northern Ireland. She referred to a number of cases in which MSNI was involved.

[16] Client A had been enjoying a planned first pregnancy. She attended hospital for her 20+ weeks scan. She was advised that the foetus was not compatible with life and if born would not survive. The diagnosis was anencephaly. She and her partner decided they wished to terminate the pregnancy but she was refused the procedure by her obstetrician because without clear guidance he could not be certain that it could lawfully be carried out. Client A was distressed, crying, shaking and inconsolable at times when told she could not receive treatment in Northern Ireland where she could be supported by the clinicians involved in her care and her immediate family. Arrangements were made for her and her partner to travel outside of Northern Ireland where she underwent a termination of pregnancy procedure.

[17] Client B presented at MSNI after she had been raped by her partner with whom she was enduring a domestically violent relationship. She did not want any more children but her partner refused to allow her to use any form of contraception. Her GP refused to refer her to any healthcare provider for further assessment or assistance because abortion was illegal in Northern Ireland. She was upset and distressed when informed that there were no grounds for abortion in Northern Ireland and that she would have to travel to England. Her distress was compounded by her fear of her controlling partner and the potentially violent reaction if he found out that she was pregnant and planning a termination. She travelled outside of Northern Ireland where she underwent a termination of pregnancy procedure.

[18] Client C, a minor under the age of 13 years, presented at MSNI with a relative having become pregnant as a result of familial sex abuse. Client C had concealed the abuse and the pregnancy and was beyond nine weeks and four days when she finally did disclose it. MSNI notified social services and the PSNI also became involved. The child was frightened and distressed when told that due to her later gestation it was necessary for her to travel to England. She travelled outside of Northern Ireland accompanied by a relative where she underwent a termination of pregnancy procedure the following week. The PSNI in this case requested that the products of conception be retained for evidence in the event of any criminal proceedings and arrangements were put in place for the PSNI to travel to England to obtain them.

[19] Ms Purvis stated that some women who become pregnant in the circumstances set out by her may become a physical or mental wreck if the

pregnancy continues and therefore meet the existing legal test for termination. Her experience, however, is that the current legal framework and the lack of guidance has created a climate of fear and uncertainty for health professionals on when an abortion can lawfully be carried out. She has witnessed the severe levels of degradation, humiliation and pain that women have to endure in already emotionally painful circumstances.

[20] A further affidavit in support of the leave application was lodged by Mara Clarke, the Director of Abortion Support Network ("ASN"). ASN is a charity that provides practical information, financial assistance and accommodation in volunteer homes for women forced to travel from the Republic of Ireland and Northern Ireland and pay privately for abortions. Her organisation contends that making abortion against the law means that when faced with an unwanted pregnancy women with money have options and women without money have babies, or do dangerous and desperate things. Since 2009 her organisation has heard from more than 600 women from Northern Ireland. She gave a number of examples from her own experience.

[21] The first case involved a 19-year-old woman who had become pregnant as a result of rape. Her family was supportive but unable to meet the financial costs of travelling to England. ASN assisted with the cost of the procedure and the family did not pay their monthly rent in order to cover the cost of travelling. When they arrived at the clinic a scan showed that she was 14 weeks and one day pregnant instead of the 11 weeks she had thought. She had to travel to an alternative clinic at increased cost which ASN paid. The woman said that ASN had literally saved her life.

[22] The second case involved a single mother who was raped 10 weeks prior to finding out about ASN and contacting them. She had very limited funds. She sold her car and arranged for her telephone line to be cut off in order to raise the amount needed to travel to England before the pregnancy reached 14 weeks gestation. She said that she could not live with continuing her pregnancy as a result of rape.

[23] The third case was a 17-year-old girl who had become pregnant as a result of rape by a family member. She was a member of the traveller community and was afraid for her life if her family discovered that she was pregnant. Although she left several frantic messages quite late at night ASN were never able to get through to her on her number again.

[24] The fourth case involved a woman who had been raped and beaten by a group of men that included a close male relative. Although a number of organisations and agencies in Northern Ireland had knowledge of her circumstances no provision was made for her, or assistance offered to her, to obtain an abortion. She managed to raise just £100 towards the cost of travelling to England and undergoing the procedure there. ASN was able to grant the remaining £1200 required for the procedure as well as the cost of the flights and hotel. She later contacted ASN to say that if they had not helped her she would be dead either by her own hand or by those who abused her.

[25] Sarah Ewart was given leave to intervene in the court below. Her submission indicated that when she was 23 years old she became pregnant with her first child. At 19 weeks the foetus was diagnosed with anencephaly which meant that it would not survive for any appreciable period of time outside the womb. She is at risk of having another pregnancy with the same condition. In these proceedings she has submitted an affidavit supporting her submission.

[26] She stated that at 19 weeks she had booked a scan at a private clinic in order to obtain a picture of the foetus and to see whether it was a boy or girl. She was then referred urgently to the Ulster Hospital Maternity Department for an ultrasound scan by a senior medical officer. It was explained to her that her body was acting as the life support for the foetus and that it would either die in life-support or shortly after being born. The diagnosis was anencephaly. If born the child was not capable of independent life and that was no prospect of the child being born long enough to have the baby home. Her doctor explained that in Northern Ireland there was no option of medical termination unless her life was in danger. The foetus did not pose a threat to her physical health and although she was in shock she could not honestly say that her mental health was at risk. She was told that she would be scanned every two weeks because of the risk of infection if the foetus died in utero.

[27] She said that she knew that she could not go through with the pregnancy when at any given moment her baby would die but she still might have to carry it for up to 2 weeks until the next scan before she knew. If the foetus survived she would have to go through the horror of a prolonged and painful labour only to produce a baby with a gross abnormality that was either dead or would necessarily die shortly afterwards. She just could not face it. She had hoped that the discussion about the change in the law in Northern Ireland might have enabled her to receive treatment at home from the medical team that had been looking after her but it was

explained that that was not possible. She was told that what had to be shown was a risk of real and serious adverse effect on the woman's physical or mental health which was either long-term or permanent.

[28] She pointed out that women in her position faced a very stark choice. If they carried the baby it meant facing the possibility that it would die before it was born but would nevertheless be carried until it was picked up on a scan and induced. Otherwise it meant facing the possibility of a long and dangerous delivery knowing that the child would not survive. Going to England meant moving outside the security and familiarity of her own health care system. In light of her experience and the risk she faces of a similar pregnancy she has campaigned with her mother for a change in the law to permit a medical termination in Northern Ireland for a fatal foetal abnormality such as she suffered.

[29] AT made an affidavit on behalf of Alliance for Choice. That is an organisation which campaigns for the extension of the Abortion Act 1967 to Northern Ireland. She made the case that it was estimated that every week some 40 women leave Northern Ireland to obtain an abortion, usually in Great Britain. She maintained that to a large degree the exporting of the abortion issue had allowed those in government to ignore the issue. Alliance for Choice considered that such an approach was hypocritical.

[30] AT became pregnant in the autumn of 2013. She and her husband went for her 20 week scan on Valentine's Day 2014. The consultant advised that the foetus had a form of dwarfism or achondroplasia and that the condition was likely to be fatal. She was referred to the Royal Victoria Hospital for a second opinion on 25 February 2014. At a further appointment on 11 March the consultant confirmed that the condition would be fatal and put her name forward for a termination of the pregnancy in light of the fatal foetal abnormality. The consultant at her local hospital told her that this was not going to happen and although she was examined by a psychiatrist that position did not change. AT continued with the pregnancy with appointments every two weeks with her consultant to establish whether the foetus had died and eventually her waters broke just under 35 weeks pregnant. A scan established that the foetal heart had stopped and delivery was then induced.

[31] AT described the shock and distress at discovery of the position at the time of the 20 week scan and how she and her husband had been given some hope that they could end the ordeal and bring forward the inevitable death of their baby and start the grieving process properly when the consultant suggested that she might be able

to have a termination. She described her situation as a nightmare during the remainder of the pregnancy. She was not able to work and had numerous encounters where people thought she had a healthy pregnancy because of her size. She found that people who knew the situation started to avoid her and she felt isolated. Some months later she got in contact with Alliance for Choice and met other mothers who had experienced the same situation. She made this affidavit because she could not sit back and do nothing knowing that there will be other women and families who will find themselves in a similar situation to hers.

[32] We acknowledge that there has been material put forward by some of the interveners relying on evidence that an abortion can have a serious adverse effect on both the physical and mental health of the woman. We also recognise that there are many women who for religious, moral or other reasons would not wish to avail of the opportunity for a termination in the circumstances with which this case concerned. Our analysis of the evidence at this stage is focused solely on the question of whether there is or would be the victim.

Consideration of standing

[33] The fundamental basis upon which the Commission pursues this case is that women and girls in Northern Ireland who are pregnant but with a diagnosis of serious malformation of the foetus or who become pregnant as a result of rape or incest are prohibited from accessing abortion services in Northern Ireland to terminate the pregnancy, notwithstanding that the continuance of the pregnancy may violate their rights under Articles 3, 8 and 14 ECHR. That was the basis upon which the incompatibility argument was raised in relation to sections 58 and 59 of the 1861 Act as a result of which a Notice of Incompatibility was served on the Crown as required by Order 121 RCJ.

[34] The issuing of that notice engaged section 5 (1) of the Human Rights Act 1998. That had the effect, pursuant to section 5(2) of that Act, of entitling any Northern Ireland Minister to be joined as a party to the proceedings. Accordingly, the entire devolved administration in Northern Ireland was put on notice of the case being made by the Commission. In addition the Attorney General for Northern Ireland, the administration's chief legal adviser, was also a party to the litigation in light of the Devolution Notice issued on the same day as the Incompatibility Notice.

[35] The unlawful act with which this case is concerned is not confined to the failures of the Department of Justice or its Minister but includes the failure of the administration in Northern Ireland, including the health service, to ensure that the provision of healthcare to pregnant women includes access to abortion services to terminate a pregnancy in the circumstances set out at paragraph [33] above if the woman considers it in her best interests.

[36] In determining this issue it is also important to bear in mind that the Commission sought as an alternative to the incompatibility claim a declaration that notwithstanding the provisions of sections 58 and 59 of the 1861 Act and section 25 of the 1945 Act women in Northern Ireland may lawfully access termination of pregnancy services within Northern Ireland in cases of serious malformation of the foetus or rape or incest. Clearly that claim proceeds on the basis that the 1861 Act does not prevent the provision of such services and that the prohibition on access to such services is unlawful because it violates Articles 3, 8 and 14 ECHR. Properly analysed, therefore, the Commission's claim is founded upon what it says is an unlawful act and its standing can only be defeated on this basis if the court is persuaded that the alleged unlawful acts are compelled by primary legislation. On this argument the court cannot, therefore, make a determination on standing without addressing the latter point.

[37] I consider, however, that there is a broader argument as to why we should not accept the appellants' argument on this issue. The modern approach to statutory interpretation was set out by Lord Bingham in R v Secretary of State for Health, ex parte Quintavalle [2003] 2 AC 687 at paragraph [8]:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

The concept of Parliament's purpose is plainly wider than Parliament's contemplation because the matter in issue in that case was whether embryos created by cell nuclear replacement fell within the meaning of the definition of embryos in section 1 of the Human Fertilisation and Embryology Act 1990. It was common case that the ability to create embryos by cell nuclear replacement was unknown at the time of the passing of the Act.

[38] There is further support for the purposive approach in Lord Steyn's speech in the same case:

> "The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas…nowadays the shift towards purposive interpretation is not in doubt."

That was also the view of Lord Nicholls in R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Homes [2001] 2 AC 349 where he said that statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.

[39] The context in this case begins with the Agreement which set out the broad parameters for the functions of the Commission in expansive terms. The original draft of section 71 of the 1998 Act expressly provided that the Commission could institute a challenge in relation to legislation or unlawful acts as long as it is satisfied the victim requirement as we discussed above. The explanatory notes to the 2007 Act indicated that the intention of the amendment was to extend the powers of the Commission to institute proceedings in its own right subject to the satisfaction of the victim requirement.

[40] With that context in mind it is now necessary to examine the effect of the amendments to section 71. The first amendment was the exclusion of section 69(5)(b) from section 71(1) and the related addition of section 71(2A) providing that section 71(1) does not apply to the Commission. Prior to this amendment the Commission was entitled to pursue proceedings for legislative incompatibility by reason of section 6(2)(c) of the 1998 Act although it was subject to a victim requirement. Since the context indicates that it was the intention of the amendment to extend the Commission's powers I consider that it would be inconsistent with that context to interpret this provision in a manner which would reduce the powers of the Commission in relation to legislative challenge. I consider, therefore, that section 71(1) and (2A) were not intended to limit the Commission's power under section 69(5)(b) of the 1998 Act to institute proceedings in respect of legislative incompatibility. The Commission retains its power to institute challenges to legislative incompatibility arising from section 6(2)(c) of the 1998 Act but, like those

mentioned in section 71(2), it need not satisfy the victim requirement in respect of such challenges.

[41] Turning then to section 71(2B) it is clear that this subsection is directed to proceedings in respect of unlawful acts and replicates the statutory scheme contained in section 7 of the Human Rights Act 1998. It is entirely consistent with the pre-existing position that the Commission may act only if there is or would be one or more victims of the unlawful act in respect of such a claim. The subsection is silent, however, in respect of proceedings raising issues of legislative incompatibility pursuant to section 4 of the Human Rights Act 1998. The appellants rely upon the requirement for an unlawful act and the definition of "human rights proceedings" as including proceedings which rely upon section 69(5)(b) to sustain their argument that legislative incompatibility cannot be pursued by the Commission.

[42] Such a conclusion is inconsistent with the context of both the Agreement and the subsequent statutory history. I do not consider that such an inconsistency is required by virtue of the terms of the legislation. In my view the proper analysis is that section 71(2C)(a)(ii) should be read so as to add the words "in respect of unlawful acts" after "Act". That would preserve the restriction on the entitlement of the Commission to proceed in respect of unlawful acts to those occasions where there was or would be a victim but would also entitle the Commission to proceed under section 69(5)(b) in respect of challenges to legislative incompatibility without the requirement for an unlawful act. It would, of course, be for the Commission to establish its standing in relation to such challenges in the usual way. In Lancashire County Council v Taylor [2005] 1 WLR 2668 it was held that a person applying for a declaration of incompatibility needed to demonstrate that they were adversely affected by the legislation being challenged. Applying that rubric to the Commission in this case it must demonstrate that there are or would be persons adversely affected by the legislation which it seeks to challenge. Such an outcome is entirely consistent with the statutory context.

[43] That leads onto the second objection that the material advanced did not indicate a sufficiently concrete factual situation and that the proceedings constituted an impermissible *actio popularis*. Insofar as it was part of this submission that the court could not look at the material advanced by the intervener or the circumstances described by Ms Purvis and Ms Clarke I do not accept that proposition. The court was bound to take into account all relevant material and the fact that the material was hearsay did not affect the need to determine to what extent it was relevant.

[44] The issue of victim status has been helpfully addressed in Law of the European Convention on Human Rights (Harris, O'Boyle and Warbrick 3rd ed.). Open Door and Dublin Well Woman v Ireland 15 EHRR 44 was an application in respect of an injunction against a company which sought to provide information about abortion facilities outside Ireland. The Commission and ECtHR considered that women of childbearing age could claim to be victims since they belonged to a class of women who may have been adversely affected by the restriction. That supports the view that a person can be a victim in circumstances where they could be adversely affected. In Norris v Ireland 13 EHRR 186 the Court considered that the very existence of legislation prohibiting private, sexual acts continuously and directly affected the applicant's private life in circumstances where there had been no prosecution but there was no stated policy not to enforce the law. Those cases support the view that in cases concerning private sexual conduct and reproductive rights the approach to adverse impact should be generous.

[45] In this case Ms Purvis has given clear accounts of the impacts upon three clients, one of whom had a serious malformation of the foetus, one of whom was arguably subject to rape in light of the absence of contraception and one of whom was the victim of familial sex crime. In addition there was a detailed account from Ms Ewart explaining her circumstances in respect of the diagnosis of anencephaly and a further similar account from AT concerning her pregnancy where the child was ultimately diagnosed with a condition known as Osteogenesis Imperfecta Type 2. Finally, Ms Clarke dealt with a number of issues around the financial circumstances and difficulties that can arise in securing termination of pregnancy services outside Northern Ireland. In my view this evidence provided adequate detail establishing that there arguably would be victims of breaches of the relevant convention obligations.

[46] I conclude, therefore, that the Commission had standing to pursue these proceedings both on the basis of an alleged unlawful act and by way of an incompatibility challenge to the legislation.

The Law

Domestic case law

[47] The learned trial judge correctly identified R v Bourne [1939] 1 KB 687, approved by this court in Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety [2004] NICA 37, as the leading

authority on the meaning of the word "unlawful" in sections 58 and 59 of the 1861 Act. In Bourne the defendant was an obstetrician who had carried out a termination procedure on a 14-year-old girl who had been raped in violent circumstances and subsequently became pregnant as a result. The defendant considered that the continuance of the pregnancy would probably cause serious injury to the girl, so serious as to justify the removal of the pregnancy at a time when the operation could be performed without any risk to her. He was prosecuted under the 1861 Act.

[48] In summing up the case Macnaghten J directed the jury that the burden rested on the Crown to satisfy them beyond reasonable doubt that the defendant did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life. He further directed them that the words "for the purpose of preserving the life of the mother" had to be understood in a reasonable sense so that if the doctor was of the opinion on reasonable grounds with adequate knowledge that the probable consequence of the continuation of the pregnancy would be to make the woman a physical or mental wreck, the jury were quite entitled to take the view that the doctor operated for the purpose of preserving the life of the mother. It is important to recognize that the ratio or legal test is contained in the words underlined and the second part of the sentence is an example of how the ratio or test might be satisfied. He noted that statutory protection for the unborn child had been provided since the beginning of the 19th century. Prior to that the killing of an unborn child was by the common law of England a grave crime but there could be justification for the act.

[49] I accept that this case established that the 1861 Act gave a significant degree of protection to the foetus. That protection was, however, qualified when in competition with the rights of the mother. Where the continuation of the pregnancy would result in a real risk of death for the mother the opportunity for life of the foetus had to give way. Similarly, where the continuation of the pregnancy would affect the mother's physical or mental health so that her life was significantly adversely affected the protection for the foetus again had to give way. In the language of the late 1930s this was described as a state of being a physical and mental wreck. In either circumstance, the loss of protection did not depend upon the state of well-being of the foetus and the fact that the foetus was healthy and had the ultimate capacity of enjoying a full life if successfully born did not afford any additional protection.

Article 2

[50] There was considerable discussion before the learned trial judge about the extent to which Article 2 of the Convention protects the right to life of the foetus. The issue came before the European Court of Human Rights in Vo v France (2005) 40 EHRR 12. That was a case in which the applicant suffered injury to her amniotic sac which in turn necessitated the termination of her pregnancy. The foetus, a baby girl, was between 20 and 24 weeks at termination. The doctor was charged with causing unintentional injury but was acquitted on the ground that the foetus was not, at that stage, a human person. After reviewing its existing case law the court concluded:

> "84. At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus, although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between states that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person — enjoying protection under the civil law, moreover, in many states, such as France, in the context of inheritance and gifts, and also in the United Kingdom —require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Art 2. The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term "everyone" and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the Member States decided to allow domestic law to provide clarifications for the purposes of the application of that Convention."

The court concluded that it was neither desirable nor even possible as matters stand to answer in the abstract the question whether the unborn child was a person for the purposes of Article 2 of the Convention.

[51] That position was reiterated in A, B and C v Ireland [2011] 53 EHRR 13 at paragraph [237]:

> "Of central importance is the finding in the above cited Vo case, referred to above, that the question of when the right to life begins came within the states' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of art.2."

[52] I consider, therefore, that it is within the margin of appreciation of each state to determine the nature of the protection that should be available for the foetus. In this jurisdiction that protection is provided by the 1861 Act and the 1945 Act. The passing of the Human Rights Act 1998 neither requires nor effects any alteration to that protection by virtue of Article 2 of the Convention. The respondent relied on the decision in Paton v British Pregnancy Advisory Service Trustees and Another [1979] QB 276 for the proposition that there can be no reasonable doubt that in England and Wales the foetus is not a legal person. The appellants submitted that the decision had to be seen against the context of the passing of the Abortion Act 1967 and therefore was of no assistance in this jurisdiction. It also tended to contradict some 19th century case law to which reference was made in Bourne. I take the view that Bourne determined in this jurisdiction that the foetus enjoyed protection under the criminal law subject to the qualification that the mother had a superior right. The foetus did not, therefore, have a right to life comparable to that of those who had been born. The protection to be afforded to the foetus will clearly be dependent on the state of the law at any given time in the future. Article 2 adds nothing to the level of protection. This conclusion is broadly in agreement with that of the learned trial judge.

Article 3

[53] Article 3 ECHR provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. It provides an absolute guarantee and there is no room for a margin of appreciation doctrine in relation to the negative obligations which it contains. The ill-treatment must attain a minimum level of severity to fall within the Article. The threshold level is relative and was described in Ireland v UK (1978) 2 EHRR 25:

> "It depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and

method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."

The recent case law of the ECtHR indicates its approach in cases where medical treatment by way of termination is refused.

[54] Tysiac v Poland (2007) 45 EHRR 42 was a case involving a woman who suffered from severe myopia. She became pregnant as a result of which she was concerned about the possibility that she might suffer a further deterioration in her eyesight. Polish law permitted abortion in certain circumstances where the health of the mother was affected. She sought medical assistance to explore whether her eyesight might be affected in which case she would have been entitled under Polish law to a termination. She complained that she had received inadequate medical examination and consideration of her condition. She had to continue with her pregnancy and her eyesight deteriorated although there was disagreement about the role that pregnancy had played in that.

[55] She presented her case on Articles 3, 8, 13 and 14. She contended that the failure to make available the possibility of a legal abortion in the circumstances by putting in place a procedural mechanism to allow her to have her right realised meant that she was forced to go through the anguish and distress of the possibility of a severe deterioration of her vision which subsequently materialised. The court recognized that the failure to provide medical treatment can give rise to a breach of Article 3 but considered that in this case the facts did not disclose a breach.

[56] In A, B and C v Ireland the three applicants described the circumstances in which each of them travelled to England for an abortion as they considered it unlikely that they had a right to such treatment in Ireland. The particular circumstances of C were that she had been treated for three years with chemotherapy for a rare form of cancer. She had been advised that it was not possible to predict the effect of pregnancy on her cancer and that if she did become pregnant it would be dangerous for the foetus if she were to have chemotherapy during the first trimester. Her cancer went into remission and she became pregnant unintentionally. She had been unaware of this when she underwent a series of tests for cancer which were contraindicated during pregnancy. She consulted her GP as well as several medical consultants and alleged that as a result of the chilling effect of the Irish legal framework she received insufficient information as to the impact of the pregnancy on her health and life and the consequences of her prior tests for

cancer on the well-being of the foetus. The court considered that the facts alleged did not disclose a level of severity falling within the scope of Article 3 ECHR.

[57] Both of these cases show that in the context of an alleged failure to provide adequate medical treatment for pregnant women the court appears to place emphasis on the entitlement of the woman to be considered for a termination under domestic law and requires a high level of severity before an Article 3 breach can be established. There are two Polish cases where domestic law provided for termination but the medical authorities procrastinated and an Article 3 breach was established.

[58] In RR v Poland [2011] 53 EHRR 31 an initial diagnosis at the 18 week stage indicated the possibility that the foetus was affected with some malformation as a result of which the applicant would have been entitled to avail of a termination. The only way of determining the issue was by genetic testing. There followed a highly distressing array of medical appointments characterised by procrastination and misinformation strongly suggesting a disinclination to accommodate the applicant as a result of which she was eventually informed that it was too late to proceed with a termination. Judge Bratza dissented on this point on the basis that the decision extended the scope of Article 3 too far.

[59] P and S v Poland [2013] 129 BMLR 120 was if anything even more distressing. The applicant was a 14-year-old girl who had become pregnant as a result of rape. She obtained a certificate from the public prosecutor to the effect that pregnancy had resulted from unlawful sexual intercourse in accordance with Polish law. She and her mother then received contradictory information about whether they needed a referral from a consultant. She was taken to see a catholic priest without asking whether she wished to see him and it became clear that he had been informed about the circumstances of pregnancy. The hospital refused to allow the abortion to be performed in their ward for religious reasons. Journalists were informed of the circumstances of the case and a hospital which initially agreed to perform the operation declined to do so because of public pressure. A family court ordered that her mother be divested of parental rights because it was alleged that the child was under pressure from mother to have the abortion. That was subsequently shown to be false. The child was driven in a clandestine manner to have the abortion carried out some weeks later. It is hardly surprising that this shocking treatment should have been considered degrading for the purposes of Article 3 but again demonstrates the high level of severity required in this context.

[60] It is difficult not to question why the standard of severity should be so high in this area where women only are affected as a result of their reproductive capacity and a materially lower threshold employed in other cases. Slyusarev v Russia [2010] was a case in which degrading treatment was established where spectacles were taken from a prisoner. I do not question the appropriateness of that decision but the disparity in the severity of the threshold which must be achieved before a woman becomes entitled to treatment by way of a termination is troubling.

[61] The learned trial judge noted at paragraph [119] of his judgment that there was no question of the state inflicting any ill-treatment on vulnerable pregnant women nor was there any suggestion that those who become pregnant in the circumstances with which this case is concerned do not get the best medical attention in this jurisdiction during their pregnancies. He also referred to the fact that no steps were taken to prevent women who became pregnant as a result of sex crime or who had a fatal foetal abnormality from travelling to Great Britain. The latter issue is, in my view, irrelevant. If the level of severity required by Article 3 is achieved and an abortion is required to alleviate it the fundamental nature of the right means that there should be no prohibition on the provision of the treatment in this jurisdiction. I accept, however, that my review of the ECHR authorities does not suggest that the threshold for Article 3 is likely to be reached so as to require an abortion other than in a case where the life of the mother is at risk. That as I understand it was the conclusion reached by the learned trial judge.

[62] In my review of the domestic law I have explained that abortions may lawfully be carried out in Northern Ireland. The effect of the Polish decisions is that there must be effective and accessible mechanisms capable of determining within appropriate timescales whether the conditions for obtaining a lawful abortion have been met. This includes providing for procedural mechanisms where there is disagreement between the pregnant woman and her doctors or between the doctors themselves. As the Polish cases show the failure to implement such measures can on occasion result in a finding of a breach of Article 3. To that extent, therefore, the article is applicable in cases of pregnancy in this jurisdiction. We have not been asked to comment on the adequacy of the present guidelines issued by the Department of Health in 2013.

Article 8

[63] It is necessary first to set the context in which this part of the claim arises. In the usual course of events where a woman becomes pregnant she will receive

medical treatment either from the National Health Service or may arrange to receive treatment privately. In the course of her pregnancy there will usually be various examinations and recommendations made by the doctor and discussed with the patient. Those discussions occasionally include the nature of the risks to the patient as a result of pregnancy and may in some circumstances lead to a discussion about the termination of the pregnancy. As I have previously noted one of the matters upon which the appellants and a number of the notice parties have placed emphasis is the importance of recognising the risk both mentally and physically to the pregnant woman in the event that she proceeds with a termination and the importance of her receiving full information about those risks.

[64] Where as a result of the discussion the doctor is satisfied that the risk to the health of the mother is greater if she proceeds with the pregnancy than if she were to have a termination and the pregnant woman indicates that she wishes to terminate the pregnancy the law steps in. Whereas in England and Wales an abortion could lawfully be performed in those circumstances under the Abortion Act 1967 in this jurisdiction the present position is that in those circumstances the termination cannot be performed either within the National Health Service or privately.

[65] The interference by the state in the entitlement of the woman to choose the medical treatment she desires, which she reasonably considers most beneficial to her and which the doctor would otherwise be content on medical grounds to provide has been considered by the ECHR as an interference with the right to private life protected by Article 8. That, of course, is a qualified right and is subject to exceptions that are in accordance with law and necessary in a democratic society in the interests of the protection of morals or the protection of the rights and freedoms of others.

[66] The appellants have placed considerable reliance on the decision of the ECtHR in A, B and C v Ireland and contend that at the very least it strongly supports their arguments in the appeal. It is necessary, therefore, to closely examine that decision. I have already set out the circumstances in relation to C at paragraph [56] above. A became pregnant unintentionally. She was unmarried, unemployed and had four young children in care. She had a history of depression during her first four pregnancies and was again battling depression during this pregnancy. She was engaged with social workers with a view to regaining custody of her children. She travelled to England for an abortion as she did not believe that she could get the treatment in Ireland. Her case therefore raised both health and welfare reasons as a

basis for the justification of the abortion. B became pregnant unintentionally and had taken the morning after pill. She had been advised by two different doctors that there was a substantial risk of an ectopic pregnancy but was aware by the time that she decided to travel to England for an abortion that it had been confirmed that the pregnancy was not ectopic. She did not feel able to care for a child at this time in her life and the case was principally concerned with whether an abortion should be available on well-being grounds. Both cases also raised issues about access to medical treatment on their return to Ireland.

[67] The Court concluded that it should reject the Article 8 claims in respect of A and B by 11 votes to 6. The majority concluded that the interference was in accordance with law and that it pursued a legitimate aim being the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect. They then went on to consider whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair balance between the applicants' right to respect for their private lives and the profound moral values of the Irish people as to the nature of life and the need to protect the life of the unborn.

[68] The answer to that question required consideration of the margin of appreciation to be accorded to the state. The majority noted at paragraph [233] that because of the acute sensitivity of the moral and ethical issues raised by abortion and the importance of the public interest at stake a broad margin of appreciation was in principle to be accorded to the state. The question, therefore, was whether the wide margin of appreciation was narrowed by the existence of a relevant consensus. The majority noted that there was a consensus amongst a substantial majority of the contracting states permitting abortion on broader grounds than accorded under Irish law. A could have obtained an abortion justified on health and well-being grounds in approximately 40 contracting states and B could have obtained an abortion justified on well-being grounds in some 35 contracting states. Only three states had more restrictive access to abortion services than Ireland.

[69] The majority concluded, however, that the consensus did not decisively narrow the broad margin of appreciation of the state. That was principally because the question of when the right to life begins came within the state's margin of appreciation and there was no European consensus on the scientific and legal definition of the beginning of life. Since the rights claimed on behalf of the foetus and the mother were inextricably interconnected the margin of appreciation accorded to the protection of the unborn led to the conclusion that the consensus was

not decisive and the margin of appreciation was not narrowed. The majority, therefore, concluded that because of the profound moral views of the Irish people as to the nature of life and the consequent protection to be accorded to the right to life of the unborn a fair balance had been struck in the domestic legislation.

[70] The dissenting judges considered that the majority had asked the wrong question. The issue was not the difficult question of when life begins. The issue was the balance to be struck between the right to life of the foetus and the right to life of the mother including her right to personal autonomy and development. It was the superior right of the mother that was the basis for the undeniably strong consensus among European states. The minority went on to explain that the rights of the mother were the rights of a person already participating in an active manner in social interaction whereas the rights of the foetus within the mother's body before birth had not been definitively determined and participation in social interaction had not even started. The rights within the ECHR were mainly designed to protect individuals against state acts or omissions while those individuals participated actively in the normal everyday life of a democratic society. That was the basis for the European consensus. The minority also considered that the severity of the criminal sanctions in this "rather archaic" law was striking.

[71] The concern about the European consensus was also highlighted in the concurring opinion of Judge Finlay Geoghegan. She was concerned that the basis for the consensus identified by the majority relied solely on the availability of abortion within the clear majority of contracting states. Although that right depended upon the legislation in force governing access to abortion the related protection for the life of the unborn in each state was not considered. In the absence of such consideration she did not accept that the abortion legislation in force necessarily demonstrated the striking by a contracting state of a particular balance between the mother and foetus.

[72] The other concurring opinion was given by Judge Lopez Guerra joined by Judge Casadevall. That opinion argued that although the state enjoys a margin of appreciation on this issue it does not confer absolute discretion or freedom of action. The case before the court was involved with a particularly important facet of an individual's existence which would normally restrict the margin allowed. That consideration has to be applied to the circumstances of each case in which a woman wishing to have an abortion for reasons of health or well-being is prohibited from doing so. The judgment analysed the regulations in Irish law *in abstracto*. The court should have looked at the degree of gravity as a crucial point in deciding the case.

Where, therefore, there were grave dangers to the health or the well-being of women wishing to have an abortion the state's prohibition could be considered disproportionate and beyond its margin of appreciation.

[73] The review of this case suggests, therefore, a rather more confused picture than might have initially appeared. Of the 11 judges in the majority at least two did not exclude the possibility of a breach of Article 8 in cases where there were grave dangers to the health or well-being of women. One further member of the majority concluded that the majority judgment failed to properly analyse the issue of the European consensus. The six dissenting opinions agreed that the majority had failed to analyse the issue of the European consensus properly and in particular had failed to recognise that the issue concerned the balance to be struck between the rights of the woman and what they concluded was, according to the European consensus, the lesser right of the foetus. The analysis of Judge Lopez Guerra plainly follows the approach of the minority in considering that the balance between the mother and the foetus is the decisive factor in striking the proportionality assessment and one can confidently say, therefore, that at least 8 of the 17 judges in the case approached the fair balance issue by accepting that the rights of the mother in certain circumstances were superior to those of the foetus.

[74] I do not consider that A, B and C v Ireland is a decision which is of decisive advantage to the appellants. It is clear from the concurring judgment of Judge Lopez Guerra that the issue which arises in this case which is whether there are or would be victims of Article 8 in the circumstances the subject of this appeal was not directly addressed by the ECtHR and there appears to have been considerable support within the Court for the proposition that Article 8 gave protection by way of a right to access to abortion for women significantly affected by health or well-being issues. I accept, however, that this view did not displace the overriding principle that each jurisdiction has a wide margin of appreciation in determining such sensitive legal and moral issues and that A, B and C v Ireland cannot be interpreted as requiring such protection for women.

[75] The appellants submitted that these difficult, sensitive and controversial issues should be left to be dealt with by the legislative process. That submission had all the more force since there was a debate in the Northern Ireland Assembly ("the Assembly") on 10 February 2016 after the first instance decision in which the Assembly rejected by 59 votes to 40 an amendment exempting from the provisions of the 1861 Act and the 1945 Act an abortion where a registered medical practitioner

diagnosed a foetal abnormality which was likely to be fatal. There were essentially three lines of argument involved in the debate. The first was that the amendment was premature in that there had been insufficient consideration of the meaning of the term fatal foetal abnormality and that further consultation was required before a decision could be made on the legislative proposal. The second objection was from those who declare themselves pro-life meaning that they favoured giving the foetus the same rights as the mother. As discussed that is not consistent with the present law. The third line of argument was from those who wished to proceed with the enactment of the amendment despite the limited opportunity for consideration that had preceded it.

[76] I am conscious of Lord Bingham's warning in R (Countryside Alliance) v Attorney General [2008] AC 719 at paragraph [45] that the democratic process is liable to be subverted if, on a question of moral and political judgement, opponents of the Act achieved through the courts what they could not achieve in Parliament. That, of course, was in the context of a declaration of incompatibility and at this stage in these proceedings I am seeking to identify the content of the existing law. As Lord Neuberger said at paragraph [98] of R(Nicklinson) v Ministry of Justice [2015] AC 657 the mere fact that there are moral issues involved plainly does not mean that the courts have to keep out. He then went on to give numerous examples of where the court had made decisions in such circumstances. That does not in any way diminish the need to take into account the restraint urged by Lord Bingham and the force of the reasons behind it which I acknowledge. In light of the wide margin of appreciation recognized by the European jurisprudence and the decisive vote within the Assembly I do not consider that it is open to the courts to derive a right to abortion from the Convention. I would not, therefore, make a declaration of incompatibility and would allow the appeal on that issue.

[77] In order to establish the balance that is struck between the mother and the foetus in this jurisdiction I am required to go back to the Bourne case and to understand in light of circumstances today the phrase "for the purpose of preserving the life of the mother" in a reasonable sense. That this is a judicial task which does not trespass on territory occupied by the legislature is, I consider, consistent with the determination by Macnaghten J in that case. I am required to extract the principle which is that the preservation of life is more than the prevention of death and involves an appraisal of the quality of life that the pregnant woman may suffer if the abortion is prohibited. Where the impact of the pregnancy experienced by the

woman exceeds that which the court considers tolerable in preserving an acceptable quality of life the court must intervene to protect and prioritise her.

[78] The position of women in our society some 80 years after Bourne has altered beyond all recognition. It was as a result of judicial intervention that women were protected from sexual abuse within marriage (R v R [1992] 1 AC 599). Discrimination in employment and the provision of services required substantial legislative intervention. The place of women within the professions and other areas of public life has changed enormously and is still evolving. That is evident in both the judiciary and politics. All of these matters have accordingly altered the scope of the right to personal autonomy and development of women in this jurisdiction.

[79] I accept that the grain of the 1861 Act and the 1945 Act was intended to provide substantial protection for the foetus but in my view the phrase "for the purpose of preserving the life of the mother" cannot in present circumstances be interpreted reasonably as confining protection for the mother by way of abortion to those circumstances where it is likely that she will be a physical or mental wreck. I have had the benefit of affidavits sworn in these proceedings by Sarah Ewart and AT. Some aspects of the effect on these women of the prohibition of abortion in this jurisdiction in their circumstances have been described in paragraphs [16]-[31]. The present law prioritises the need to protect to a reasonable extent the life that women in these emotionally devastating situations can enjoy. In my opinion that requires the court to determine what is reasonably tolerable in today's society. That is not to be defined by the values of the 1930s. I conclude that circumstances such as those described in those affidavits fall within the scope of the Bourne exception interpreted in accordance with that test. I consider that in each case the effects on these women were such that the option of abortion in this jurisdiction after appropriate advice should have been open. That conclusion is not dependent upon the state of health of the foetus.

[80] I have examined the issue of the balance to be struck between the interests of pregnant women and the foetus in this section of the judgment both in terms of the approach of the ECHR and the domestic jurisprudence. I was referred to an impressive body of international law in which the case for more extensive rights of abortion for women was made. These statements had varying weight properly attached to them but largely were taken into account by the ECtHR in its consideration of the A, B and C v Ireland case. Normally if these statements, resolutions or recommendations were to have effect it would be through the

mechanism of the jurisprudence of the European Court but there is nothing to indicate that at present, in any event, the statements add anything of jurisprudential weight to the issues.

[81] The appellant also cross appealed on the issues of serious malformation of the foetus and differential treatment pursuant to Article 14. In both cases I have nothing to add to the conclusions reached by the trial judge and would dismiss both cross appeals.

Remedy

[82] The respondent's submissions in the appeal recognised that the effect upon women facing the difficult situations with which this appeal is concerned would vary and that whereas in some cases a breach of Article 8 of the Convention would be established, in others it would not. Nevertheless the respondent contended that the learned trial judge was correct to make a declaration of incompatibility based on the approach taken by the House of Lords in R (Wright) v Secretary of State for Health [2009] 1 AC 739. That was a case in which there was a list drawn up of people considered unsuitable to work with vulnerable adults which did not give any provision for first according them a hearing. Although it did not follow that there was a breach of convention rights in every case the House of Lords made a declaration of incompatibility. The respondent now submits that this court should not uphold the declaration of incompatibility but should make a declaration that an abortion is lawful in the circumstances set out in the Order 53 Statement.

[83] I do not accept that submission. As a result of my conclusion about the existing law in Northern Ireland it would be necessary to review the processes for ensuring that the rights of women to an abortion in accordance with this judgment were practical and effective. There are different approaches that might be taken to achieve this. It could be done by way of guidelines and it may be that interim guidelines would have been appropriate to provide a mechanism in the near future. That would certainly have been appropriate if it was decided that legislation was the better way forward. A legislative solution might recognize that in many cases of sex crime or where there is no likelihood of survival the right to have abortion available would arise.

[84] This is a matter which in my view would require consultation and engagement in particular with medical practitioners and the police where one is dealing with distressed victims of rape. I consider that the making of a declaration

in the terms sought by the respondent would effectively amount to judicial legislation. I bear in mind the approach of Lord Lowry in C (a minor) v Director of Public Prosecutions [1996] AC 1, 28 where he said:

> "It is hard, when discussing the propriety of judicial law-making, to reason conclusively from one situation to another … I believe, however, that one can find in the authorities some aids to navigation across an uncertainly charted sea. (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty."

[85] I would have left the remedy in the hands of the appropriate legislature for the time being. I am conscious, however, that there is a pressing need to ensure that there is a practical and effective method of implementation of the rights of women in the position of Sarah Ewart or AT. If the executive and legislature is unwilling or unable to address this pressing need I note the suggestion by Lord Neuberger at paragraph [104] of Nicklinson:

> "104. Quite apart from this, there is force in the point that difficult or unpopular decisions which need to be taken, are on some occasions more easily grasped by judges than by the legislature. Although judges are not directly accountable to the electorate, there are occasions when their relative freedom from pressures of the moment enables them to take a more detached view. As Lord Brown of Eaton-under-Heywood said in the Countryside Alliance case at para 158, "Sometimes the majority misuses its powers. Not least this may occur when what are perceived as moral issues are involved"."

I would prefer to see this matter determined by our elected representatives but if there is no provision for a practical and effective method of securing rights for those entitled to them the court may still have a role.

Conclusion

[86] Since I consider that no issue of incompatibility arises on the issues before this court I would allow the appeal in relation to the declaration of incompatibility. I do not consider it necessary to make any further declaration since this judgment speaks for itself.

GILLEN LJ

[87] I have had the benefit of reading in draft form the judgment of Morgan LCJ in this matter.

[88] I respectfully agree with and adopt all that he has said by way of:

- Background to the application
- The issue of standing.
- The issue of Article 2 of the Convention.
- The issue of Article 3 of the Convention.
- The issue of Article 14 of the Convention
- The issue of incompatibility.

[89] I also agree with his conclusion that the court must allow the appeal in relation to the relevant findings of Horner J namely that:

- The failure to provide exceptions to the law prohibiting abortion in respect of fatal foetal abnormalities at any time and pregnancies due to sexual crime up to the date when the foetus becomes capable of an existence independent of the mother is contrary to Article 8 of the Convention.

- Sections 58 and 59 of the Offences Against the Person Act 1861 and Section 25 of the Criminal Justice Act (NI) 1945 are incompatible with Article 8 of the Convention in so far as it is an offence –

(i) to procure a miscarriage at any stage during a pregnancy where the foetus has been diagnosed with a Fatal Foetal Abnormality;

(ii) to procure a miscarriage up to the date where the foetus is capable of being born alive where the pregnancy arises as a result of rape or incest.

[90] I agree that that the cross appeal must be dismissed on the issues of serious malformation of the foetus and differential treatment pursuant to article 14 of the Convention for the reasons given by Morgan LCJ. I agree that this court should not make a declaration that an abortion is lawful in the circumstances set out in the Order 53 Statement.

[91] However, I depart from the approach adopted by Morgan LCJ in relation to his proposed alteration of the effect of R v Bourne (1939)1 KB 687 and his analysis of Article 8 of the Convention in this context. In particular I do not agree with the contents of Paragraph 79 of his judgment which reads –

> "[79] I accept that the grain of the 1861 Act and the 1945 Act was intended to provide substantial protection for the foetus but in my view the phrase "for the purpose of preserving the life of the mother" cannot in present circumstances be interpreted reasonably as confining protection for the mother by way of abortion to those circumstances where it is likely that she will be a physical or mental wreck. I have had the benefit of affidavits sworn in these proceedings by Sarah Ewart and AT. Some aspects of the effect on these women of the prohibition of abortion in this jurisdiction in their circumstances have been described in paragraphs [16]-[31]. The present law prioritises the need to protect to a reasonable extent the life that women in these emotionally devastating situations can enjoy. In my opinion that requires the court to determine what is reasonably tolerable in today's society. That is not to be defined by the values of the 1930s. I conclude that circumstances such as those described in those affidavits fall within the scope of the Bourne exception interpreted in accordance with that test. I consider that in each case the effects on these women were such that the option of abortion in this jurisdiction after appropriate advice should have been open. That conclusion is not dependent upon the state of health of the foetus."

The Bourne Decision

[92] In summary my view is that it is institutionally inappropriate and a reach too far for this court to change the effect of the relevant legislation and its interpretation in R v Bourne [1939]1 KB 687, which has stood the test of time in this jurisdiction, without legislative intervention. If the law on abortion is to be changed, we should follow the precedent set by England when the position as interpreted in Bourne was altered by the 1967 Abortion Act as later amended by the Human Fertilisation and Embryology Act 1990. In terms the permissive provisions of the 1967 legislation protected against an offence under Sections 58 and 59 of the 1861 Act by affording a circumscribed basis for termination after careful consideration by the legislature. Such a change is not a task that should be taken up by this court.

[93] Before turning to my analysis of the impact of Article 8 of the Convention on the existing law in Northern Ireland, it may be helpful to set out the existing law in brief and consider certain principles that have emerged from Strasbourg jurisprudence.

The existing law

[94] The existing law on abortion in Northern Ireland is governed by Sections 58 and 59 of the Offences Against the Person Act 1861 and Section 25 of the Criminal Justice Act (Northern Ireland) 1945 (comparable to the 1929 English legislation dealing with the offence of Child Destruction).

[95] In short the procuring of a miscarriage was one of the offences against the "person". The 1945 legislation created, inter alia, a defence causing the death of a child capable of being born alive in circumstances where there was "an act done in good faith for the purpose only of preserving the life of the mother". Bourne's case interpreted that exception as including a circumstance where the consequences of the pregnancy would be to make the woman a physical or mental wreck. It is important to appreciate that that interpretation has been adopted and applied by this court in Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety [2004] NICA 37.

Relevant principles emerging from Strasbourg

[96] I discern the following principles relevant to this case from a review of the Strasbourg jurisprudence –

(i) There is no right to abortion under the terms of the Convention. The case of A, B and C v Ireland [2011] 53 EHRR 13 cited by Morgan LCJ makes it clear that there is no right to abortion within Article 8 of the Convention.

(ii) I agree with the proposition advanced by Mr McGleenan that the court in Strasbourg has been cautious on such matters and has never articulated any such right based on an evaluative or interpretative approach to Article 8 of the Convention.

(iii) The unborn child is not protected by Article 2 of the Convention (see Vo v France [2005] 40 EHRR 12) and the issue of when the right to life begins has conventionally been accepted within the margin of appreciation vested in domestic States. (See Nicklinson v United Kingdom [2015] 61 EHRR.) Article 2 of the Convention is silent as to the temporal limitations on the right to life (see Vo v France at paragraph 75).

(iv) The issue of when a right to life begins conventionally falls within the margin of appreciation which States enjoy. No consensus has emerged as to when life begins in Strasbourg legislation. Indeed article 2 can extend to prenatal life and the unborn (see H v Norway ECHR 1992 Applic.No.17004/90).

(iv) I have sought in vain to find any authority in Strasbourg which has defined, limited or proscribed the content of the law in any State which purported to place a prohibition on abortion.

(v) The philosophy behind this caution has been a recognition that such matters are politically, morally and ethically contentious and as such fall within the margin of appreciation. A, B and C is authority for the principle that State authorities are recognised to be in a superior position to international judges in giving an opinion on the necessity for such a restriction. Any assessment of social or moral needs (within the concept of necessity under the terms of Article 8 of the Convention) is at least initially within the purview of such authorities. It recognises that States may reasonably differ on such highly sensitive and difficult areas and the role of the domestic policy maker should be given special if not exclusive weight.

(vi) That is not to say that a court is deprived from considering in these circumstances whether or not there has been a proportionate interference with Article 8 rights. Rather it is that in considering that balance, very considerable weight can and should be accorded to the views of Parliament. Thus, in Nicklinson's case the Strasbourg Court said:

> "In any event the court is satisfied that the majority of the Supreme Court Judges did deal with the substance of the first applicant's claim. With the exception of Baroness

> Hale and Lord Kerr, they concluded that she had failed to show that development since *Pretty* meant that the ban could no longer be considered a proportionate interference with Article 8 rights …. The fact that in making their assessment they attach great weight … or very considerable weight … to the views of Parliament does not mean that they failed to carry out any balancing exercise. Rather, they chose – as they were entitled to do in light of the sensitive issue at stake and the absence of any consensus among Contracting States – to conclude that the views of Parliament weighed heavily in the balance."

Article 8 of the Convention

[97] Article 8 of the Convention merits repetition:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society and in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[98] As has been indicated in the judgment of Morgan LCJ, the right to respect for private life was considered in relation to the abortion in A, B and C v Ireland [2011] 53 EHRR 13.

[99] I consider it is beyond plausible dispute that interference by the state in the entitlement of a woman to choose her beneficial medical treatment on medical grounds in the context of abortion gives rise to a right to private life within the context of Article 8 of the Convention.

[100] The real issue in this matter arises out of Article 8(2) to the effect that the interference must be in accordance with the law, it must pursue a legitimate aim (in this context that being the protection of morals and or the unborn child), it must be necessary and proportional for a permitted purpose and strike a fair balance

between the right to respect for private life and, again in this context, the public interest in this jurisdiction in according respect to the moral values in the society as to the nature of life and the need to protect the life of the unborn. This is an evaluative exercise which excludes any hard edged or bright line rule.

[101] The current restrictions on the right to abortion are clearly in accordance with the law set out in relevant legislation and as interpreted in Bourne case.

[102] I turn then to whether or not those restrictions pursue a legitimate aim in the protection of morals in this jurisdiction of which the protection of the right to life of the unborn child is one aspect.

[103] I believe that the majority decision in the case of A, B and C provides the answer. As the Lord Chief Justice has observed at paragraph [68] of his judgment, the majority view was that because of the acute sensitivity of the moral and ethical issues raised by abortion and the importance of the public interest at stake a broad margin of appreciation must be accorded to the state. This margin of appreciation can of course be narrowed by the existence of a relevant consensus within the state membership. However, the majority view was that since the right to life comes within the state's margin of appreciation and there was no European consensus on the scientific and legal definition of the beginning of life, the consensus did not decisively narrow the broad margin of appreciation.

[104] I do not share the doubts cast on the impact of this majority decision by the arithmetical approach adopted by Morgan LCJ in paragraph [73] of his judgment.

[105] In my view the principle is tolerably clear. A state should enjoy a margin of appreciation on this issue whilst at the same time recognising that it does not confer absolute discretion or freedom of action. In the instant case, the issue of abortion is a classic instance of the type of highly controversial issue touching on social, moral and religious policies on which there is no consensus either in Europe or for that matter in this jurisdiction. Such an issue requires Parliament to be allowed a wide margin of judgment. The imposition of personal opinions of professional judges in matters of this kind lacks constitutional legitimacy. Courts should not make decisions freighted with the individual attitudes of the judiciary. (See Lord Sumption at paragraph [228] of R(Nicklinson) v The Ministry of Justice [2014] UKSC 38.)

[106] In Nicklinson's case in the UKSC Lord Reed illuminatingly discussed the issue between paragraphs 296-298 as follows:

> "296. … the Human Rights Act introduces a new element into our constitutional law, and entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their procedures, their accountability and their legitimacy. Accordingly, it does not alter the fact that certain issues are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as issues of that character are relevant to an assessment of the compatibility of executive action or legislation with Convention rights, that is something which the courts can and do properly take into account. They do so by giving weight to the determination of those issues by the primary decision-maker. There is nothing new about this point. It has often been articulated in the past by referring to a discretionary area of judgment."

Lord Reed went on to say at paragraph [298]:

> "298. That is not to say that it is inconceivable that the current assessment of Parliament could alter in the future, changes in social attitudes, or the evolution of the Convention jurisprudence, could bear on the application of the Convention in this context, as they have done in other contexts in the past. But that is not the position at present."

[107] Accordingly, to borrow the words of Lord Neuberger in Nicklinson at paragraph [75], where the provision enacted by Parliament is both rational and within the margin of appreciation accorded by Strasbourg, a court in the United Kingdom would normally be very cautious before deciding that it infringes a Convention right.

[108] That is not to say of course that the mere fact that there are moral issues involved *necessarily* excludes the intervention of the court. Thus as Lord Neuberger records at paragraph [98] of Nicklinson there have been a number of instances where the courts have been ready to develop the law on what are literally life or death issues and then to shoulder responsibility for implementing the law so developed.

[109] However, turning to the instant case, in striking the balance under Article 8(2) of the Convention, this court must take into account and weigh heavily the assessment of the pressing social and moral needs as interpreted by the legislature in this context. This is classically an area where opinions within a democratic society may reasonably differ. In my view it is not the role of this court to determine that the failure to provide exceptions to the law prohibiting abortion in respect of FFAs and pregnancies due to sexual crime up to a prescribed date is contrary to Article 8 of the Convention.

[110] The difficulties of a court making such a conclusion without the benefit of the widespread input and consultation which the legislative and executive branches of government have already undertaken and would be bound to continue to undertake are numerous. This is classically an area where medical expertise and accountability about the procedures involved and the legitimacy of the degree of interference with personal choice would be beyond the constitutional reach of the judiciary. How is a court to define the practical scope of exceptions to the relevant existing legislation? Is there a clear and precise definition of lethal foetal abnormality or for that matter serious malformation of the foetus in the medical sense? Is weight to be given to and account taken of the number of children who apparently have survived such a diagnosis? Does this not accord ill with the assertion of Horner J that there is no right to life to be protected in light of such a diagnosis? How carefully is the existing medical opinion on such issues to analysed before invoking such an exception?

[111] In the realm of sexual crime, should the law allow abortion only for women who have been the victim of rape? Should this exception embrace other sexual crime such as sexual activity with a person under the age of 16? What are the criteria for establishing this? Is it necessary to have made a complaint to the police before accessing a termination? Should a police report be required and what would this say? Would the victim be compelled to name the criminal before availing of the remedy? Should the exemption apply to the extent that there is no requirement other than a declaration to a medical practitioner by the woman that the pregnancy is the result of a sexual crime committed against her? In the case of incest who is going to determine when an incestuous relationship has occurred and how is this proved?

[112] Will the consequence of such a law involve the right to conscientious objection for those who participate in treatment for abortion in respect of (i) lethal foetal abnormality; and (ii) sexual crime? What would be the extent of the objection permitted?

[113] These were all matters which were properly addressed in the "Consultation on Abortion 2014" circulated by the Department of Justice in Northern Ireland. They

illustrate not only the practical difficulties in the court venturing to make determinations such as that by Horner J but they illustrate also the depth and breadth of the moral and social issues at large. These presumably were also all matters still properly under consideration by the Assembly in Northern Ireland before the recent political impasse arrived.

[114] I conclude that this is an issue which is paradigmatically for the Executive to determine in the wake of legislative intervention. It is a matter of extraordinary complexity and moral entanglement on which views have shifted over the decades. Into this arena the court should fear to tread and ought to adopt an approach of balanced impartiality and well-judged caution if the appropriate constitutional balance is to be preserved.

[115] Whatever its defects in the eyes of some or perhaps many, the current law provides a measure of certainty and legislative accountability. If observed with integrity and without fretful backward glances the Bourne exception provides a law which is adequately accessible, sufficiently precise and honours the wording of the relevant statutes. For this court to unilaterally open up the long standing Bourne exception to a wider but more uncertain and imprecise spectrum based on what is tolerable, which in effect seeks to circumvent the wording of the 1861 Act and the 1945 Act, is liable to do a disservice to the cause of justice and potentially offends against the principle of the division of powers.

[116] Similarly, in deciding whether a fair balance has been struck between the right to respect for private life and the public interest in this jurisdiction in according respect to the moral values in the society as to the nature of life and the need to protect the life of the unborn these considerations should act as a restraint on the court to the extent that a broad margin of appreciation must be accorded to the state. I consider that a fair balance has been struck by the law as it presently stands until the legislature decides otherwise.

[117] I appreciate that these are comfortless sentences for those various women living in the circumstances depicted in the affidavits sworn with admirable intent in this matter. From my own part I have difficulty seeing how at least some of them would not fall within the current Bourne provision but it is not for this court rather than the legislature to hasten a further shift in moral standards that may have been unfolding for some time.

[118] In all the circumstances I would allow the appeal and dismiss the cross appeal.

WEATHERUP LJ

[119] I am in agreement that NIHRC has standing to maintain this application for Judicial Review. I am also in agreement that the right to protection from inhuman or degrading treatment under Article 3 of the European Convention is not engaged in the present case. However, I find that I am unable to agree with Morgan LCJ that the legislation may be interpreted in a manner that admits of additional grounds for termination of pregnancy by redefining the meaning of "unlawful" in the Offences against the Person Act 1861. I find that consideration of the issues raised by this application must take place in the context of the Article 8 right to respect for private life. First of all, a comment on the legal position of the unborn child.

The criminal law on abortion in Northern Ireland

[120] The Common Law has long recognised that the killing of an unborn child is a crime. That crime came to be defined in legislation and the present version finds expression in the Offences against the Person Act 1861. In the language of the Victorians, the procuring of a miscarriage was included in offences against the 'person'. Statutory protection for the unborn child was extended in Northern Ireland in 1945 with the introduction of the offence of Child Destruction, which protects the later stages of pregnancy and concerns a child capable of being born alive. The language of the 1945 Act concerns the causing of the death of a 'child'. The offence was stated to be subject to the express exception for "an act done in good faith for the purpose only of preserving the life of the mother". Although that express exception had not been included in the offence of procuring a miscarriage under the 1861 Act, it has come to be treated as equally applicable to that offence.

[121] In June 1938 a 14 year-old girl was raped and Aleck William Bourne, an obstetric surgeon, procured a miscarriage at St Mary's Hospital, London, he being concerned that the continuance of the pregnancy would probably cause serious injury to the girl. He was charged with procuring a miscarriage under the 1861 Act. The summing up of the case to the jury by Macnaghten J is reported in R v Bourne [1939] 1KB, 687 and remains the basis of the interpretation of the law of abortion in Northern Ireland to this day.

[122] The offence under the 1861 Act of procuring of a miscarriage required that the action be undertaken 'unlawfully'. The offence of Child Destruction had been

introduced in England in 1929. Macnaghten J directed the jury that the word 'unlawfully' in the 1861 Act imported into the offence of procuring a miscarriage the same exception as applied to the offence of Child Destruction. Accordingly, procuring a miscarriage was also subject to the exception for an act done in good faith for the purpose only of preserving the life of the mother.

[123] The jury were directed that if the doctor was of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of the continuance of the pregnancy would be to make the woman a physical or mental wreck, the jury were quite entitled to take the view that the doctor, under those circumstances and in that honest belief, was operating for the purpose of preserving the life of the mother. Mr Bourne was acquitted.

[124] In restating the law on abortion in Northern Ireland in 2004, the Court of Appeal concluded:

> "It follows that an abortion will be lawful if a jury considers that the continuation of the pregnancy would have caused a risk to the life of the mother or would have caused serious and long-term harm to her physical or mental health" (Nicholson LJ in Family Planning Association of Northern Ireland v The Minister for Health, Social Services and Public Safety [2004] NICA 37).

[125] I have read the judgment of the Lord Chief Justice in draft. I am of the opinion that it would not be appropriate for the Court to attempt to reinterpret the meaning of "unlawfully" in sections 58 and 59 of the 1861 Act. The scope of unlawful conduct, as stated in the ruling of Macnaghten J in Bourne, has been applied in Northern Ireland since that ruling. It has formed the basis of the statement of the legal position on abortion set out by this Court in recent times. It has informed the consideration of the issue of termination of pregnancy in consultation papers and in the deliberations of the Assembly. It should not be reinterpreted by the Court after 80 years. The appropriate forum for amendment of the 1861 Act is the Assembly, although any such amendment has been rejected to date. The Court has power to consider the compatibility of the present legal arrangements with the European Convention and the outworking of any finding of incompatibility would involve

further consideration by the Assembly in relation to remedial action. It is the compatibility issue that is considered below.

The legal status of the unborn child in Northern Ireland

[126] In criminal law the unborn child is protected to the extent outlined above. In civil matters the general approach is that the unborn child does not have legal personality. While there is recognition of certain interests of the unborn child, rights in civil matters are acquired at birth when legal personality is acquired.

[127] A wider legal status has been accorded at the European level as stated in Vo v France [2005] 40 EHRR 12. It has been stated that it may be regarded as common ground in Member States that the embryo/foetus belongs to the human race and the potential of that being and the capacity to become a person, require protection in the name of human dignity (para 84).

[128] However, this legal status does not extend as far as recognising that the unborn child has the 'right to life' under Article 2 of the European Convention on Human Rights. Article 2 provides that "everyone's right to life shall be protected by law." Where, as a result of medical negligence, the termination of a pregnancy was necessary, the applicant mother claimed a breach of Article 2. The European Court of Human Rights held that there was no violation of Article 2. The unborn child was not protected by Article 2. However, the ECtHR stated that it was neither desirable nor even possible, as matters stand, to answer in the abstract the question whether the unborn child was a 'person' for the purposes of Article 2 of the Convention (para 85).

[129] In a separate opinion a number of the Judges took a different approach. It was stated that even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after birth. The life of the unborn child, it was said, though protected in some of its attributes, could not be equated to postnatal life and for that reason could not enjoy "a right to life" as protected by Article 2 of the Convention.

[130] The requirement for protection for the unborn child in the name of human dignity does not depend on a determination as to when 'life' begins. Nor does the

absence of a 'right to life' for the purposes of Article 2 nor the absence of 'legal personality' in civil matters deprive the unborn child of 'legal status'.

[131] Thus, while the unborn child is not covered by the Article 2 right to life, it remains to be considered how effect may be given to the recognition that the unborn child belongs to the human race and that the potential of that being and the capacity to become a person require protection in the name of human dignity. That recognition may arise under Article 8.

The right to respect for private life

[132] Article 8.1 provides for the right to respect for private life. Where a pregnancy impacts on the life or health or wellbeing of the expectant mother then restrictions imposed by the State on medical termination of pregnancy may amount to interference with the right to respect for the private life of the woman.

[133] Where there is interference with that right to respect for private life, Article 8.2 provides for the extent to which such interference may be justified, that is, the State may establish that such restrictions are 'in accordance with law' and 'necessary for a permitted purpose', in the present case being for the protection of morals or the rights or freedoms of others.

[134] The application of the right to respect for private life was considered by the ECtHR in A, B & C v Ireland [2011] 53 EHRR 13 in relation to the law of abortion in the Republic of Ireland, which restricts abortion to a risk of the loss of the life of the mother:

(i) The right to respect for private life extends to personal autonomy and personal development and to physical and psychological integrity. Prohibition on the termination of pregnancies, when sought for reasons of health and/or wellbeing, may amount to 'interference' with the right to respect for the private life of a woman.

(ii) The potential interference may arise because of the prohibition on termination for reasons of the physical or mental health of the mother and also for reasons concerning the 'wellbeing' of the mother. The scope of permitted terminations in Northern Ireland has not extended to concerns for the

'wellbeing' of the mother and in that regard there is interference that has to be justified. The assessment and appreciation of 'mental wellbeing' may be considered to have become more developed in recent times.

(iii) However, when a woman is pregnant her private life becomes closely connected with the developing foetus and her right to respect for her private life must be weighed against other competing rights and freedoms, including those of the unborn child.

(iv) The essential question that had to be determined in A, B & C was whether the interference that arose from the prohibition on termination in those cases was an unjustified interference with the right to respect for private life. Article 8.2 provides for such justification if the restriction is, first of all, in accordance with law and secondly, if it is necessary for a legitimate aim.

(v) The legitimate aim was the protection of morals as reflected in the views of the people as to the protection of the life of the unborn child.

(vi) In considering whether the prohibition of abortion struck a fair balance between a woman's right to respect for private life on the one hand and the legitimate aim of the restrictions based on the profound moral views of the people on the other hand, the breadth of the margin of appreciation to be accorded to the State was crucial. A broad 'margin of appreciation' was held to exist whereby the ECtHR afforded substantial latitude to the State institutions in determining where the balance of interests lay. The ECtHR concluded that the margin of appreciation that extended to the national authorities had not been exceeded.

[135] The presence of a relevant consensus within the European states informs the breadth of the margin of appreciation afforded to a State. On the issue of termination of pregnancy a relevant consensus exists on the permitted grounds of termination, which consensus accepts wider access to termination than those available in Ireland or Northern Ireland. The margin of appreciation extends to the legitimate aim of the measures under challenge, to the measures adopted to achieve that aim, to the understanding of the beginning of life, to the protection to be accorded to the unborn and to the balance of the conflicting rights of the mother. The ECtHR held in A, B & C v Ireland that the broad consensus across Europe on

wider grounds for termination did not offend the broad margin of appreciation afforded to the State on the issue of termination of pregnancy.

[136] The concept of the 'margin of appreciation' that is afforded to national institutions is relevant to the relationship between the ECtHR and the Member States. This does not bear on the relationships between the institutions within the State, namely the legislature, the executive and the judiciary. The internal relationships are determined by the internal arrangements of each State. The legislature is the law making power and in this State the judiciary has the power to determine the compatibility of a measure with the Convention, a power granted by Parliament. In making a compatibility assessment the judiciary accords to the legislature a 'discretionary area of judgment'. There need be no conflict between ECtHR leaving to the State an issue as to the compatibility of a measure and it being determined by the institutions of the State that the measure is not compatible.

[137] Of particular note for present purposes was the observation of the ECtHR in A, B & C v Ireland that the national authorities are better placed than the European authorities to determine the content of the national moral view that provides the legitimate aim of the prohibition and also the measures that are necessary to achieve conformity with that moral view.

[138] The issue of rights to termination of pregnancy on health and wellbeing grounds, being within the 'margin of appreciation' of the State, falls to be determined by the institutions of the State. How that operates between the legislature, the executive and the judiciary was considered by the Supreme Court in R (Nicklinson) v Ministry of Justice [2014] UKSC 68.

(i) The margin of appreciation for national action will be divided between the legislature, the executive and the judiciary according to the principles as to the separation of powers.

(ii) The court has jurisdiction to determine if the restrictions (in the present case, on termination of pregnancy) are compatible with Article 8 as that function has been accorded to the courts by parliament.

(iii) In so doing the courts extend a discretionary area of judgment to the legislature in adopting or not adopting a measure to address the issue.

(iv) The court may consider whether it is 'institutionally appropriate' to make a finding of incompatibility, particularly on a controversial issue, where the question of incompatibility is not straightforward and where the legislature is actively considering the issue.

[139] Factor (iv) is of particular significance in considering the present case. The termination of pregnancy is clearly a controversial issue and has been receiving consideration in the Assembly. The NIHRC contends that the present arrangements are incompatible with the European Convention. If the Court were to be satisfied on incompatibility then in the above circumstances an added consideration for this Court would be whether it was appropriate for the Court to intervene.

The compatibility with Article 8 of the prohibition on abortion in the proposed categories

[140] It is clear that the prohibition on termination of pregnancy, when sought for reasons of health and/or wellbeing, may amount to 'interference' with the right to respect for the private life of a woman, contrary to Article 8.1.

[141] The essential question that then has to be determined is whether the interference that arises from the prohibition is an unjustified interference with the right to respect for private life under Article 8.2. Such justification requires that the prohibition is, first of all, in accordance with law and secondly, necessary for a permitted purpose. The burden is on the State to provide justification for the restrictions imposed.

[142] First, the interference must be "in accordance with the law". The prohibition in question is to be found in sections 58 and 59 of the Offences against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945 as interpreted in R v Bourne in 1939 and applied in Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety in 2004.

[143] To be 'in accordance with law', the law must be adequately accessible and sufficiently precise. The effect of the legislative provisions as interpreted by the courts are adequately accessible and sufficiently precise in that it is clear that abortion is not permitted by reason of foetal abnormality, or by reason of rape or

incest, or by reason of serious malformation of the foetus. The restriction is 'in accordance with the law' for the purposes of Article 8.2.

[144] Next, the restriction must be necessary for a permitted purpose. The permitted legitimate aims include "the protection of morals" and "the protections of the rights and freedoms of others". The restriction on abortion is directed at the protection of the unborn child, based on the moral view that the unborn child requires protection. The moral view that the unborn child is entitled to protection, a view not necessarily based on a religious perspective, is not necessarily dependant on a belief that 'life' begins at conception rather than birth.

[145] This moral view is that of the majority in this jurisdiction, as measured by the votes of the members of the last Northern Ireland Assembly. The applicants rely on opinion polls in support of the view that a majority of the population favour extended abortion. However, I agree with Horner J that little weight can be attached to opinion polls for this purpose. A referendum has not been held and cannot be expected in this jurisdiction where the use of a referendum is usually reserved for constitutional issues. Accordingly, support for a measure must be gauged by the votes of members of Parliament and in respect of devolved matters that means the votes of the members of the Northern Ireland Assembly. I am satisfied that the restriction on termination of pregnancies pursues the legitimate aim of the protection of morals reflecting the views of the majority of the members of the last Assembly on the protection of the unborn child.

[146] It is not necessary to consider the protection of the rights and freedoms of others and whether 'others' in Article 8.2 of the Convention includes the unborn, a point left undecided in A, B & C v Ireland.

[147] Next, the restriction must be necessary and this introduces the concept of proportionality. The Supreme Court has identified the approach that the courts must take to proportionality as involving four aspects as follows –

(i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

(ii) whether the measure is rationally connected to the objective;

(iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

(iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (per Lord Reed in Bank Mellat v HM Treasury [2013] UKSC 39 at paragraph 74).

[148] The burden is on the State to justify the restrictions on termination. To do so it must present to the Court the materials that would satisfy the requirements of justification and establish the proportionality of the legal framework.

Importance of the Objective

[149] The first step is that the objective is sufficiently important to justify a restriction on termination. There can be no doubt as to the importance of the objective of protecting the unborn child.

Rational Connection

[150] The second step is to establish a rational connection between the measures that have been adopted (namely the prohibition on abortion for fatal foetal abnormality, rape and incest and serious malformation of the foetus) and the legitimate aim (namely the protection of the unborn child on moral grounds). The prohibition on termination of pregnancy must reasonably be expected to contribute towards the achievement of the objective. Horner J referred to the absence of evidence on the issue of justification. Some subjects lend themselves more readily to the production of evidence. Other issues, such as those in the moral or social sphere, cannot so readily be made subject to evidence or accurate measurement. I would be satisfied that it could reasonably be inferred that, the more restrictive the permitted scope for abortion, the fewer will be the terminations that are likely to occur, even allowing for the prospect of unlawful terminations in Northern Ireland and the wider availability of lawful abortions in Great Britain. To that extent the objective is furthered by the measure.

[151] Much of our present analysis of proportionality originates in the decision of Dickson CJ in R v Oakes (1986) 1SCR 10C in the Supreme Court of Canada. In stating that the measures adopted must be rationally connected to the objective in question, Dickson CJ stated that the measures adopted must not be arbitrary, unfair or based on irrational consideration. On that analysis, rationality in this context embraces an absence of arbitrariness and unfairness. These aspects will be considered in the discussion below of the issue of achieving a fair balance between private and public rights and interests.

Least Intrusive Measure

[152] The third step is that the measures in question are no more than necessary to achieve the objective. Horner J stated that the legal position remains uncertain as to whether this factor is a part of the assessment of proportionality. In my view it is clear that this factor is a part of the assessment of proportionality and has been applied by the Supreme Court in adopting the four aspects of proportionality set out above, which has become the standard approach.

[153] What has been uncertain is the meaning of the requirement that the measure should be "no more than is necessary". A strict interpretation of that phrase would condemn many measures where it was possible to conceive of alternative means that might involve less interference. However, the phrase has to be interpreted more broadly. To return to the Supreme Court of Canada in RJR McDonald v Canada [1995] 3SCR 1999, it was stated that the measures employed must be the least intrusive "in light of both the legislative objective and the infringed right" and should fall "within a range of reasonable alternatives".

[154] The United Kingdom Supreme Court has not adopted a strict interpretation. Lord Reed in Bank Mellett said of the 'least intrusive means' test that a strict interpretation would allow only one legislative response to an objective that involved limiting a protected right. It is recognised that the least intrusive means test may be applied without unacceptably compromising the achievement of the objective and as the measure being one that it was reasonable for the legislature to impose. It is emphasised that the courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

[155] Horner J found that there was no convincing evidence that the potential criminalisation of women in the stated category satisfied the least intrusive test. This might be said of the criminalisation of many types of conduct. I am satisfied that the legislative prohibition on termination is within the range of reasonable alternative measures that could be adopted to address the legitimate aim of protecting the unborn child.

Fair Balance

[156] The fourth step is that a fair balance has to be struck between individual rights and interests and public rights and interests. The rights and interests include those of the unborn child. That fair balance should also take account of the requirement for an absence of arbitrariness and unfairness and irrationality.

[157] The present legal framework permits termination of pregnancy in the circumstances identified above and prohibits termination in other circumstances. The prohibition is intended to protect the unborn child based on the profound moral view of the people, as represented by their elected members of the Assembly, that the unborn should be protected.

[158] Closer attention might now be paid to the nature of that moral view and the manner in which the existing legal framework in relation to termination may be said to reflect a moral view. This is to focus on the nature of the moral view that permits termination in the stated circumstances and prohibits termination in the proposed cases. At this stage the focus is not on the scope of the proposed extensions to the existing grounds for abortion or the conditions that might be applied to the proposed extensions.

[159] The existing arrangements recognise the present right to termination in the event of a risk of the loss of the life of the mother or a significant threat to her physical or mental health. It extends not simply to preventing the death of the mother but to a concern for the quality of life of the mother. In a consideration of the balance of the interests of the mother and the unborn child and the public interest, as reflected in the present legislation, the current position, reflecting the legitimate aim of the protection of the predominant moral view, permits the termination of a healthy unborn child if there is such a significant risk to the mother's life or physical

or mental health, based on medical evidence and upon the decision of the mother not to accept the risk.

[160] Certain ingredients of the moral view on the protection of the unborn child emerge from a consideration of the present arrangements permitting termination. In the balance between the mother and the unborn child, the moral view admits of the rights of the mother prevailing over those of the unborn child, based on the condition of the mother. The condition of the mother is determined by medical assessment. There will of course be uncertainty in many cases about the nature of the risk to the mother's life or physical or mental health. However, the nature of that risk will be subject to medical assessment from case to case, a matter on which medical views may differ. The rights of the mother extend beyond the risk of the death of the mother to a significant risk to the physical or mental health of the mother. This reflects a concern for the quality of life of the mother. The moral view, as reflected in the present arrangements, is not based simply on the dilemma of a choice between the loss of the mother or the loss of the unborn child. The requisite risk to the mother may result in the termination of a healthy unborn child. The mother may decide to accept the risk to her life or physical or mental health and the child will be born.

[161] The measures to be adopted in relation to the termination of pregnancy should be legislative choices and not judicial choices. While parliament has accorded to the courts the decision on the compatibility of the legislative measures with the European Convention, ultimately it is the Assembly that should devise the legislative scheme and introduce the required measures. In assessing the compatibility of the measures the courts will extend the discretionary area of judgment to the legislative choices and recognise that where the precise line is to be drawn on a particular issue is a legislative choice. How does this outline of the nature of the moral view affect the proposed grounds for termination?

[162] Turning to <u>fatal foetal abnormality</u>. Here there is to be taken to be no sufficiently serious risk to the mother's life or physical or mental health but the risk is to the unborn child who cannot survive. Were it to be the case that the diagnosis of fatal foetal abnormality had significant impact on the life or physical or mental health of the mother, termination would be permitted under the existing law. As noted above the 'interference' with a woman's right to respect for private life does not arise only by reason of impact on her life or physical or mental health but may

also arise by reason of impact on her 'wellbeing'. A request for termination by reason of fatal foetal abnormality may well arise because of impact on wellbeing. Medical assessment of the mother's wellbeing would presumably be a requirement of any such extension of the permitted grounds for termination, just as medical assessment of the mother's condition would be an aspect of the present arrangements.

[163] What qualifies as a fatal foetal abnormality is the medical assessment that the unborn child cannot be born alive or cannot survive birth. As with the position of the mother who will be permitted termination on the grounds of risk to life or physical or mental health there may again be uncertainty about the nature and extent of the risk (this time to the unborn child) and again that would be a matter for medical opinion. An absence of precision as to the extent of the risk to the mother's physical or mental health does not prevent lawful termination under the present arrangements.

[164] Given the entitlement to termination of a healthy unborn child in the event of the requisite risk to the mother's life or physical or mental health, what is the moral view that prohibits termination in the case of an unborn child that cannot survive? It is not based simply on the protection of the unborn child which may be terminated if it is healthy and puts the mother at sufficient risk. One objection is to the absence of definition of a fatal foetal abnormality and the concern with instances of live births after a prognosis of still birth. Ultimately, as with the present absence of a definition of a fatal risk to the mother, the outcome would depend on a medical assessment of the unborn child, about which there can be no certainty. A mother assessed at substantial risk may proceed with the birth of the child and may not suffer the assessed risk but that possibility does not undermine the present legal arrangements.

[165] Another objection appears to involve the refusal to regard an impact on the 'wellbeing' of the mother as sufficient justification. One might expect the fair balance to shift when the wellbeing of the mother is affected and the unborn child has lost the prospect of life.

[166] Horner J concluded that, in the balance between the mother and the unborn child in the case of a fatal foetal abnormality, there was nothing to weigh in the balance against the rights of the mother, as there was no human life to protect. I am unable to agree with that analysis. The interests of the unborn child have to be

weighed in the balance. However, when the unborn child's prognosis is that it cannot survive, the nature of the balance is altered.

[167] The evidence submitted on behalf of the respondent does not address the particular character of the legitimate aim of the restrictions by reference to the precise nature of the moral view that the unborn child should be protected in such circumstances. The evidence submitted concerns the materials circulated in the consultation process about the scope of proposals for amendment of the present law. The focus is on the practicalities of amendments and the nature of conditions that might apply, all entirely legitimate matters for discussion. What is absent is the underlying rationale for the exclusion of fatal foetal abnormality *by reference to the moral view on the protection of the unborn child* when that protection is not afforded in those cases where termination of pregnancy is permitted under present arrangements in the case of a healthy unborn child by recognising a preference for the quality of life of the mother.

[168] The next situation concerns pregnancy resulting from rape or incest. Should this result in a sufficiently serious risk to the life or physical or mental health of the mother, then termination is permitted. Whether there is a serious risk to the life or physical or mental health of the mother or a serious risk to her wellbeing, would again be the subject of medical assessment. No doubt the impact of pregnancy arising from rape or incest on a woman who wished to have a termination would be profound. Of course, that woman may decide to proceed with the birth, just as the woman whose life or health is at risk and who would otherwise be entitled to lawful termination.

[169] What is the nature of the moral view that seeks protection of the unborn child when the woman has suffered the trauma of rape or incest and would permit termination only if she demonstrated risk to life or physical or mental health of a sufficiently serious nature? It cannot only arise from a concern for the protection of the healthy unborn child because in the event of a significant risk to the physical or mental health of the mother that pregnancy could be lawfully terminated.

[170] Objections appear to relate to issues about the confirmation of rape or incest and the impact of such a decision on subsequent criminal proceedings against the man involved. Other jurisdictions have addressed this aspect by a system of certification by prosecuting or other authorities. Criminal trials invariably regulate

admissible evidence so there need be no impact on subsequent criminal proceedings. Objection may be made to any certification system as an early assessment has to be made of the allegation of rape or incest. That, in any event, is the present position where a termination is sought on the grounds of impact on the life or physical or mental health of the mother as the result of rape because a medical assessment of the impact of the alleged offence on the mental health of the woman would involve an assessment of the circumstances which are alleged to have occurred.

[171] While this category is concerned with rape or incest, there has been discussion of "sexual crime" leading to pregnancy which has generally been concerned with those under 18 years. Females under 13 cannot consent and would be included in rape. Females from 13 to 16 may consent to sexual conduct that amounts to a crime and could be included as a matter of legislative choice.

[172] Again I view the evidence submitted on behalf of the respondent as not addressing the particular character of the legitimate aim of the restrictions by reference to the moral view that the unborn child should be protected. Again what is absent is the underlying rationale for the exclusion of pregnancy arising from rape or incest *by reference to the moral view on the protection of the unborn child* when that protection is not afforded in those cases where termination of pregnancy is permitted under present arrangements.

[173] The third category in issue concerns <u>serious malformation of the foetus</u>. Again it remains the case that if the mother is able to demonstrate the required risk to life or health a termination may occur. The proposal concerns termination of pregnancy by reason of the disability of an unborn child who is capable of living a life with that disability. Here the available material demonstrates a clearer counterbalance in the public interest that seeks to afford protection to the disabled against discrimination. The NIHRC contends that the protections against discrimination do not extend to the unborn child. However, in this instance the termination of a life that is capable of being lived is being denied by reason of disability. In the consideration of the private interests of the mother, who in this instance is not at risk to her life or health, and the public interest in protecting the unborn in the name of human dignity, including the unborn child at risk of termination because of disability, the fair balance will have altered. The underlying rationale for the restriction of the termination of a pregnancy with a serious malformation of the foetus is clearer in such a case, based as it is on the prevention of

discrimination against the disabled. However, as with the other instances discussed above, a justification has not been effectively articulated *by reference to the moral view on the protection of the unborn child* when compared with present arrangements for lawful termination.

[174] It is not apparent that the legitimate aim of the protection for the unborn child, namely the moral view that the unborn child should be protected, has addressed the boundaries that have been set by the interpretation of the existing legislation. The existing legal position permits termination of a healthy unborn child based on the risk to the mother. The moral view is not to protect the unborn child in all circumstances but to prefer the rights of the mother where she is at sufficient risk. That is not simply to address the risk of the death of the mother but the risk to the quality of life of the mother. That being so the objections to termination in cases of fatal foetal abnormality and rape and incest are not ultimately grounded on the absolute protection for the unborn child but on the practicalities of defining the scope of the proposed extensions and identifying the conditions that should apply. The evidence does not address a principled moral view of the dividing line between what is presently permitted and what is proposed. This is not to say that there may not be such a justification, if the rationale for the permitted grounds for termination and for the refusal of the proposed grounds for termination, by reference to the legitimate aim of protecting morals, were to be articulated. Without that principled moral view being articulated one part of the fair balance cannot be established and the fair balance cannot be adequately assessed.

[175] I would be inclined to the provisional view that the restriction on the termination of pregnancy in cases of fatal foetal abnormality and as a result of rape and incest would amount to a breach of the right to respect for private life as the evidence in the present case does not establish that the restrictions are justified, either on the ground of establishing a rational connection or a fair balance. There has been a failure to establish an absence of arbitrariness and a rational connection at the boundary between the permitted grounds and the proposed grounds on the one hand and the objective of protecting the unborn child on the other hand. There has also been a failure, for the same reason, to establish a fair balance of individual rights and interests and public rights and interests.

[176] Further, I would be inclined to the provisional view that the restriction on the termination of pregnancy in the case of serious malformation of the foetus may not

amount to a breach of the right to respect for private life as the restriction may be capable of justification where it advances the public interest in preventing discrimination against disability. However, in this case there also remains an absence of attention to an evidence based justification for the treatment of cases of serious foetal abnormality.

[177] I return to the issue of whether the word "unlawfully" in the 1861 Act can be interpreted so as to find that the proposed categories for termination may be found not to be "unlawful". Section 3 of the Human Rights Act 1998 permits the Court to "read down" legislation so that it may be given effect in a way that is compatible with Convention rights. NIHRC contends that the 1861 Act and the 1945 Act should be read so as to exclude the proposed categories from "unlawful" conduct because otherwise the legislation would be incompatible. As stated above I have expressed only a provisional view as to the compatibility of the provisions. However, even if incompatibility were established I am satisfied that it would not be possible to read down the legislation. The proposed categories require definition and conditions, an exercise that would involve much more than may be achieved by this interpretive requirement. The existing legal framework has given rise to litigation over the guidelines that should be issued by the relevant Department and generated much debate. That process would be further complicated by what I consider would amount to judicial redrafting of the legislation.

Is it institutionally appropriate for the Court to intervene?

[178] In relation to the Article 8 claim for the right to respect for private life I have expressed the provisional view that, on the evidence before the Court, the exclusion of fatal foetal abnormality and pregnancy by reason of incest or rape from the permitted grounds for termination of pregnancy have not been justified. This is of course a controversial issue and is primarily a matter for legislation and remains under consideration in the Assembly. This is a policy area where the Department of Justice has been active and continues to be active, subject to the current restraints on the operation of the devolved institutions. This Court has to consider whether in all the circumstances it is institutionally appropriate to intervene in respect of the legislation. This judgment may inform further consideration of the issues. As the matter will receive further consideration in the Assembly I would conclude that it is not appropriate to intervene at this stage.

The NIHRC Cross Appeal

[179] The NIHRC cross appealed on three matters rejected by Horner J, first the exclusion of serious foetal abnormality in the findings on incompatibility, second the claims concerning inhuman or degrading treatment under Article 3 and thirdly the claim of discrimination under Article 14.

[180] As will be apparent from the discussion above, I would dismiss the cross claims in relation to serious foetal abnormality and in relation to Article 3.

[181] The claim of discrimination is based first of all on the criminalisation of women, secondly on differential healthcare provision in Northern Ireland and thirdly on the financial burden imposed on women in Northern Ireland.

[182] The legislation applies to all who act contrary to the provisions. The use of criminal sanctions is the common approach within each jurisdiction within the United Kingdom to enforce the legislative choice as to the boundary between the lawful and unlawful termination of pregnancy. There is no discrimination based on criminalisation.

[183] As to the differential treatment of women resident in Northern Ireland in relation to healthcare services and to the financial burden, the devolution system permits the different jurisdictions of the United Kingdom to adopt individual approaches to a devolved issue. The Supreme Court dealt with this issue in relation to the non-availability of free NHS healthcare abortion services in England for Northern Ireland residents. The relevant 'status' was that of a Northern Ireland resident present in England and the comparison was with a resident in England. The different treatment of English residents and Northern Ireland residents was based on the policy of leaving the separate provision of free healthcare to each of the four countries of the United Kingdom and this was held to be justified (R(A and B) v Secretary of State for Health [2017]UKSC 41).

[184] In the present case the relevant status is that of a Northern Ireland resident who does not have the same access to abortion services in Northern Ireland as are available in England. If that constitutes a 'status' for the purposes of Article 14 the different treatment in the different jurisdictions arises from the legislative choice that the Northern Ireland Assembly may make. If that choice involves a breach of Article

8 then it is unnecessary to consider whether it may also amount to discrimination. In any event, the evidential shortcomings on the issue of justification under Article 8 also apply to the issue of justification under Article 14. As I am satisfied that it is not institutionally appropriate to intervene as the issues are to receive further consideration in the Assembly, I would not make any finding in respect of discrimination.

[185] Accordingly, I too would allow the appeal and make no Order on the application for Judicial Review.